IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.127 OF 1989

Shri Pandya Ramji Ladya ..Appellant
(Original Defendant No.1)

versus

1. Shri Jamya Ramji Ladya
2. Shri Madhav Bhiva Ladya,
3. Shri Kashinath Bhiva Ladya
4. Shri Kanha Ramji Ladya ..Respondents
(Nos.1 to 3 Org. Plaintiff and No.4 Org. Defendant)

Mr.A.J.Joshi for the Appellant

Coram : S.R.Sathe, J.
Dated : 28th March, 2006

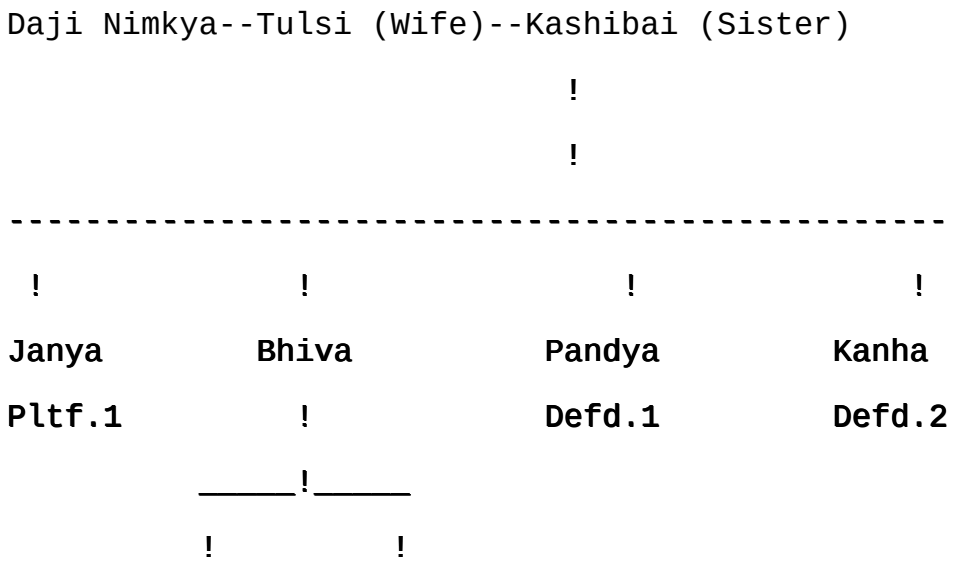
ORAL JUDGMENT

1. Appellant the Original Defendant in Regular Civil Suit No.51 of 1981 has preferred this appeal against the judgment and order passed by the 3rd Additional District Judge, Thane, in Civil Appeal No.262 of 1984, whereby the Order passed by the trial Court decreeding the plaintiffs suit for partition and separate possession and directing defendants to give possession to the extent of plaintiff's share was confirmed and appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as Plaintiffs and

Defendants.

2. Brief facts giving rise to this appeal are as under:

. The suit lands described in detail in paragraph 1 of the plaint were received by deceased Daji Nimkya Tokrya in 32G proceeding. He died issueless in the year 1967 leaving behind his wife Tulsi. So, after the death of Daji she became the owner of the suit property. Tulsi had no other legal heir except her sister Kashibai. The plaintiffs and defendants are children of Kashibai. In order to appreciate their relation it would be worthwhile to give genealogy.



Pltf.2 Pltf.3

. According to the plaintiff, when Tulsibai died in the year 1969, the defendant No.2 Kanha had gone to Shigaon, so his three bothers got the suit lands partitioned and started cultivating the same. Bhiva died sometime in 1978. In the month of April 1981 the defendant No.1 obstructed the plaintiff in cultivating the land and started claiming exclusive ownership to the suit land. The plaintiff, therefore, made query with Talathi and came to know that in the year 1972 defendant No.1 has got his name entered in the record of rights in respect of the suit lands. According to plaintiff they as well as the defendants were having actual share in the suit property. Plaintiffs therefore filed suit for partition and separate possession of the suit lands.

. The Defendant No.1 filed his written statement and opposed the suit claim. He admitted the relationship between the parties. However, denied the plaintiff’s case that after the death of Daji they were helping Tulsibai in cultivation of the suit lands. The defendant No.1 also denied that

after the death of Tulsibai the three brothers got the lands partitioned and were cultivating the same. The defendant No.1 further contended that he is cultivating the suit lands since the time of Daji Tokrya and after his death he was helping Tulsibai in cultivating the suit land. After death of Tulsibai with the consent of plaintiffs the suit lands were entered in his name. However, as there was increase in the price of the suit lands, plaintiff filed false suit. He also contended that 4-5 years prior to her death Tulsibai has in fact given the suit land to him as owner and thus he is in possession of the suit lands as owner for the last more than 12 years and as such he has also acquired title to the suit lands by virtue of adverse possession. Hence, on all these grounds the defendants prayed for dismissal of the suit.

. On these pleadings the learned trial Judge framed issues at exhibit 26.

. In order to prove their respective case, both the parties adduced oral as well as documentary evidence,. After considering the said evidence the learned trial Judge came to the conclusion that

Plaintiff No.1 has 1/4th share in the suit land and the plaintiff Nos.2 and 3 together are having 1/4th share in the suit land. He, therefore, decreed the suit accordingly and directed the defendants to deliver the possession of the land to the extent of plaintiffs share to him.

. Being aggrieved by the above mentioned order the original defendant No.1 filed Civil Appeal No.127 of 1989. After hearing arguments of both the learned Advocates the 3rd Additional District Judge, Thane came to the conclusion that the plaintiff has actual share in the suit land alongwith defendant No.1 and the decree passed by the trial court regarding partition and separate possession is legal and correct. He, therefore, dismissed the appeal.

. The above mentioned order passed by the First Appellate Court is challenged by the Original Defendant No.1 in the present Second Appeal. From the perusal of the record it appears that while admitting the appeal this Court (Coram:Dawood, J.) has passed the following order:

"The Appeal is admitted for the Substantial

> Question of Law is whether the defendants can be said to be the last holders, heir having regard to the service from whom the property came to her."

. I have heard the learned Advocate for the Appellant. Though the defendants were served through Court service notice, they did not appear. As a result of the same hearing proceeded ex-parte. In this appeal before me Shri Joshi, learned Advocate for the defendant has urged only two points. Firstly, he submitted that the courts below have not appreciated the evidence on record and wrongly held that the suit property is not exclusively owned by the defendant. Secondly, he canvassed before me that both the courts below wrongly relied on the provisions of Hindu Succession Act, 1956 and held that plaintiffs are having share in the suit land. According to him, the parties being tribal the provisions of Hindu Succession Act are in fact not applicable to them. he also submitted that as per the provisions of Section 40 of the Bombay Tenancy and Agricultural Land Act (hereinafter referred to as BTAL Act). it cannot be said that the plaintiffs are having right, title and

interest in the suit property. He, therefore, submitted that the appeal be allowed and decree for partition and separate possession, passed by the Courts below be set aside.

. The relationship between the parties is not in dispute. It is also an admitted fact that the said land were initially owned by Daji and he acquired the same in pursuance of the 32G proceeding carried out as per the provisions of BTAL Act. It is not in dispute that Daji died issueless leaving behind his widow Tulsibai in the year 1967 and thereafter Tulsibai was cultivating the suit land and she died in 1969, leaving behind only one relative namely her sister Kashibai. It is the case of Defendant No.1 that during her lifetime Tulsibai had in fact given the suit lands to him. However, it is very clear that there is absolutely no evidence worth the name to substantiate this contention. It is pertinent to note that the name of Defendant No.1 was not even entered in the record of rights during the lifetime of Tulsibai. It is clear from the Mutation Entry No.188 dated 24.8.1972 exhibit 37 that the name of Defendant No.1 Pandya was entered after about three years of the death of

Tulsibai. It is only mentioned in the said entry that Pandya looked after Tulsibai and as such the name has been entered as heir of Tulsibai. However, it is very clear that no proper inquiry was made at the time when the name of Pandya was entered. Though the defendant No.1 has contended that his name was entered with the consent of plaintiffs the defendent has not adduced any cogent evidence in that behalf. So, under such circumstances, merely because the name of Defendant No.1 was entered in the record of rights by virtue of the above mentioned mutation it cannot be said that he has acquired legal valid title in respect of the suit land and that he has become exclusive owner of the same.

. It is nobody's case that late Tulsibai had executed any will. Nor it is the case of either side that Tulsibai was having any other legal heir. So it is clear from the record that Tulsibai left behind her, sister Kashibai and children of Kashibai. So, naturally her property will devolve as per the provisions of Hindu Succession Act, 1956.

. Shri Joshi, learned Advocate for the

Defendant strenuously argued before me that the provisions of the Hindu Successions Act are not applicable to the instant case. However, it must be mentioned that this contention was not at all taken by the defendant at any time either in the trial court or in the First Appellate Court. Not only that, but even in the present appeal memo this ground is not taken by the defendant. According to Mr.Joshi the parties to the present litigation are of Schedule Tribe and as such in view of the provisions of Section 2(2) of Hindu Succession Act, 1956 the provisions of the said Act are not applicable. It would be worthwhile to see what Sectio 2 says. It runs as follows:

> 2(1) This Act applies---
>
> a) To any person, who is an Hindu by religion in any of its form or developments includding.....
>
> b).....
>
> c).....

> 2(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

If defendant No.1 wants to take advantage of this provision then obviously defendant must establish that late Tulsibai was a member of any ScheduleTribe within the meaning o clause 25 of Article 336 of the Constitution. However, it must be noted that there is absolutely nothing on record to show that late Tulsibai was of Schedule Tribe. As no evidence is adduced in this behalf by the defendant no reliance can be placed by the Defendant on Section 2. So, I am not at all inclined to accept the argument advanced by the learned Advocate for the Defendant in this behalf.

. It is also argued on behalf of the defendant that as a result of the provisions of Section 40 of the BTAL Act Defendant No.1 alone would succeed to

the property of Tulsibai as he was cultivating the land of Tulsibai during her lifetime and even thereafter. In order to find out whether there is any substance in this argument it would be worthwhile to see what Section 40 of the BTAL Act says. It runs as follows:

> 40.(1) Where a tenant(other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy.
>
> (2) Where the tenancy is inherited by heirs other than the widow of the deceased tenant, such widow shall have a charge of maintenance on the profits of such land.

It is needless to say that for application of the above mentioned section, first, defendant has to establish that Tulsibai was "Tenant" as contemplated under BTAL Act. In order to find out whether she is

a tenant, reference must be made to Section 2(18) wherein 'tenant' is defined. From the material on record it appears that Daji Nimkya became owner of the suit land in pursuance of the completion of the proceeding under Section 32G of the BTAL Act. So, under such circumstances, Tulsibai cannot be said to be a tenant as contemplated in Section 40 of the BTAL Act. From the bare reading of Section 40 mentioned above it is very clear that for application of said Section it must be shown that the heir is willing to continue the tenancy. In the instant case there is no sufficient evidence to show that the present plaintiff were not willing to continue. On the contrary it seems that they are and were asserting their rights as tenants. Merely because the name of the Defendant No.1 was entered in the record of rights, we can't jump to the conclusion that the plaintiffs had surrendered their rights or that they were not willing to continue the tenancy. While considering this aspect useful reference can be made to a case **Vinod Ganpule vs. Appa Ganu, Writ Petition 267 of 1980** decided by this Court on 11.9.1989 wherein it has been observed that Section 40 of the BTAL Act creates substantive rights in the heirs of the tenant and unless those

rights are surrendered clearly as required by the law it cannot be assumed that the heir is not willing to continue the tenancy. In the instant case, I have in fact held that Tulsi was not a tenant at the time of her death. She was in fact cultivating the land as the owner. So, the provisions of BTAL Act are not at all applicable. Assuming for the sake of argument that she was a tenant, still there is no compliance of Section 40 and as such it cannot be said that the defendant No.1 alone acquired the rights while his brothers namely the plaintiffs and defendant did not acquire any right. So, I am not inclined to accept the argument advanced by the learned Advocate for the defendant No.1 in this behalf.

. Once it is said that the provisions of section 15 of the Hindu Succession Act are applicable then it is very clear that the plaintiff is having 1/4th share, the plaintiff's 2 and 3 together are having 1/4th share and the defendant 1 and 2 are also having 1/4th share each. So, the decree for partition and separate possession passed by the courts below is legal and correct. There is no necessity to interfere with the same.

. In this view of the matter, there is no substance in this appeal. Appeal is dismissed with costs.

(S.R.Sathe, J.)